**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

YASSINE BAOUCH, et al.,

Plaintiffs,

v.

WERNER ENTERPRISES, INC. d/b/a WERNER TRUCKING and DRIVERS MANAGEMENT, LLC,

Defendants.

8:12CV408

**BRIEF IN SUPPORT OF
IN SUPPORT OF
DEFENDANTS' MOTION
TO DECERTIFY THE CLASS**

I. INTRODUCTION

Plaintiffs claim certain nontaxable per diem payments Werner paid to drivers under an optional per diem plan are not wages and should be considered payments for drivers' business expenses. To prove their claims, Plaintiffs must prove the per diem payments are equal to or reasonably approximate expenses actually incurred either Werner's behalf or solely as a result of drivers' employment with Werner, by each of the over 50,000 drivers in the class. However, Plaintiffs do not have any evidence of the expenses actually incurred by any driver and the drivers' testimony establishes that the nature and amount of their expenses vary from driver to driver and day to day. Individual issues exist as to whether the types of expenses incurred by each driver primarily benefit Werner and as to the amount of each driver's actual expenses. Those questions cannot be resolved on a class-wide basis.

Plaintiffs attempt to meet their burden of proof by relying on an estimate Werner provided to the IRS, regarding the amount of expenses Werner expected drivers would incur. The estimate was based on discussions with three drivers and a fleet manager and a review of certain national data. The estimate does not prove the expenses actually incurred by each of the over 50,000 drivers in the class and does not overcome the multitude of individual issues that preclude this case from being resolved on a class-wide basis.

Individual issues also exist as to Werner's affirmative defenses and as damages. In addition, the class must be decertified because the class includes drivers who did not suffer any damages even under Plaintiffs' theory.

II. BACKGROUND

A. Werner’s Per Diem Program.

Each of the over 50,000 drivers in this certified class action voluntarily elected to enroll in Werner's optional per diem program. (Filing 112, Second Memorandum and Order Nunc Pro Tunc, p. 9; Filing 92-1, Affidavit of Steven K. Tisinger ("Tisinger Aff."), ¶6). Because Werner’s per diem program is an accountable plan under the Internal Revenue Code, the per diem portion of the drivers’ pay is non-taxable. (Filing 92-1, Tisinger Aff. ¶3). Drivers who chose to enroll in the per diem program received more take-home pay on each paycheck because the per diem portion of their weekly wage was not taxable. (*See* Ex.1-KK, WRN-BAOUCH00002616, Company Driver Per Diem Program).

Werner offered the per diem program as an incentive for recruiting because other trucking companies offered similar tax benefit programs to their employees. (Filing 92-1, Tisinger Aff., ¶4). When Werner developed its per diem program, Werner estimated the amount of meals and incidental expenses drivers may incur over the road based on discussions with three drivers and a fleet manager and data from the U.S. General Services Administration. (*See* Ex.1-B, Wingert Depo. 99:5-11; 14:10-15; 97:12-25; Ex.1-GG, Tax Dept. Memorandum from Jeff Wingert to Deb Walker, WRN-BAOUCH00013758-13759, Ex. 1-GG, Tax Dept. Memorandum from Jeff Wingert, WRN-BAOUCH00013787-13789.). This estimate was developed to show the basis for the per diem amount in Werner's proposed plan. (*See* Ex. 1-B, Wingert Depo. 99:5-11). The IRS informed Werner that expenses such as showers, laundry, or parking fees should not be included in Werner's estimate of expenses, because the those expenses were not deductible incidental expenses. (Ex.1-GG, Tax Dept. Memorandum from Jeff Wingert to John Steele and Bob Synowicki, WRN-BAOUCH00013760).

The type and amount of expenses drivers incurred varied from driver-to-driver and day-to-day. Some drivers estimated they spent $30 per day while over the road. (Ex. 1-CC, Oluande Depo. 21:9-13; 21:20-22; see also Ex. 1-V, Kinnison Depo. 21:8-15; 21:16-19). Other drivers estimated they spent closer to $40 per day or more, though these estimates depended on each driver's circumstances. (Ex. 1-U, Horton Depo. 37:25-38:3; Ex. 1-H, Blanker Depo. 13:3-7; Ex. 1-X, Minenga Depo. 14:6-8; 14:25-15:3; Ex. 1-V, Kinnison Depo. 21:8-15l 21:16-19 ; Ex. 1-E, Alicea Depo. 10:17-25; Ex. 1-BB, Vega Depo. 39:20-23; 40:22-41:4; Ex. 1-Y, Peterson Depo. 18:6-11; Ex. 1-F, Anderson Depo. 21:7-11).

The number of meals a driver ate depended on the driver and the day. (Ex. 1-AA, Sohmer Depo. 42:14-18; 43:8-9; Ex. 1-V, Kinnison Depo. 21:16-25). Many drivers do not eat three meals every day:

> Q. Did it ever vary or change? Were there days you could get by for 35 or 40 bucks a day rather than 55 bucks a day?
> A. Yeah, some days it could.
> Q. Go ahead.
> A. Some days you just don’t feel like eating.
> Q. Yeah.
> A. **You don’t eat three hefty meals every day, especially when you’re driving**.

(Ex. 1-V, Kinnison Depo. 21:16-25; see also Ex. 1-AA, Sohmer Depo. 42:14-18; 43:8-9) (emphasis added).

Many drivers carry coolers of food and drinks in their trucks. (Ex. 1-P, Foster Depo. 25:24-26:1; Ex. 1-CC, Oluande Depo. 22:14-17; Ex. 1-K, Conner Depo. 17:22-25; Ex. 1-N, Edwards Depo. 35:4-12; Ex. 1-H, Blanker Depo. 13:12-17, Ex. 1-V, Kinnison Depo. 22:1-14; Ex. 1-Q, Fregoso Depo. 37:18-20). Drivers admit carrying coolers allows drivers to reduce their daily expenses. (Ex. 1-CC, Oluande Depo. 22:18-20; 24:3-6; Ex. 1-H, Blanker Depo. 13:18-20, 13:23-14:2; Ex. 1-V, Kinnison Depo. 22:15-24; *see also* Ex. 1-L, Cortez Depo. 30:18-23; Ex. 1-Z, Rembert Depo. 54:3-5).

Werner's drivers also have access to fast food restaurants, such as Subway and McDonald's, at hundreds of truck stops that accept Werner's fuel card. (*See generally* Ex. 1-MM - Excerpts from Werner's Fuel Stop Book, WRN-BAOUCH000018467-82; Ex. 1-OO - Information Regarding Resources Available to Drivers, Quick-Service Restaurants Available at Love's Truck Stops, WRN-BAOUCH000018987; Fresh Food at Pride, WRN-BAOUCH000018783-18784; Pilot Flying J Restaurants, WRN-BAOUCH000018992-18993; TA and Petro Stopping Centers; WRN-BAOUCH00019017-19022; Ex. 1-L, Cortez Depo. 25:13-19; Ex. 1-V, Kinnison Depo. p. 26:8-27:5; Ex. 1-P, Foster Depo. 42:15-22). At many of those truck stops, drivers also have access to other restaurants where one can buy breakfast, lunch, or dinner for less than $8.00 per meal. (*See*, *e.g.*, Ex. 1-OO - Longway's Diner Menu, WRN-BAOUCH000018983-84; Charlie's Family Dining Menu, WRN-BAOUCH000018991; Apple Barrel Restaurant Menu, WRN-BAOUCH000018997; Schatz Truck Stop Menu, WRN-BAOUCH00018999-19005). Drivers may take advantage of the lower prices at those restaurants on any day.

While some drivers estimated they spent up to $15 per day on showers, Werner drivers can also shower **for free** at hundreds of truck stops with the purchase of fuel and at Werner's terminals. (*See* Ex. 1-MM - Excerpts from Werner's Fuel Stop Book, p. WRN-BAOUCH000018459; Ex. 1-O, Encinas Depo. 15:17-25; *see also* Ex. 1-NN - Werner Terminal Information, WRN-BAOUCH00018413-00018451). Plaintiff Larrow testified that his trainer paid for his showers, so he generally did not pay for showers when he was a student driver. (Ex. 1-W, Larrow Depo. 42:1-6).

The types of expenses Plaintiffs claim they incurred over the road vary by driver. These expenses included showers, laundry, and parking fees, which the IRS cautioned should not be included as reimbursable expenses. (Ex. 1-R, Gutierrez Depo. 42:3-4; Ex. 1-N, Edwards Depo. 34:22-35:3; Ex.1-GG, Tax Dept. Memorandum from Jeff Wingert to John Steele and Bob Synowicki, WRN-BAOUCH00013760). Plaintiff Rembert claimed his expenses included an earpiece he purchased for his phone. (Ex. 1-Z, Rembert Depo. 14:14-19). Plaintiffs Alicea and Larrow’s expenses included cell phone use. (Ex. 1-E, Alicea Depo. 11:1-3; Ex. 1-W, Larrow Depo. 41:14-17). Larrow's expenses also included cigarettes. (Ex. 1-W, Larrow Depo. 46:15-20). Plaintiff Sohmer's expenses included gloves, personal items, clothing, flashlights, jackets, and rain gear. (Ex. 1-AA, Sohmer Depo. 27:4-16). Plaintiff Minenga's expenses included laundry, razor blades, and toothpaste. (Ex. 1-X, Minenga Depo. 15:4-10). Plaintiff Head's expenses included snacks and “supplies." (Ex. 1-S, Head Depo. 24:19-20). Plaintiff Foster testified her expenses included laundry, a water heater, and a stove. (Ex. 1-P, Foster Depo. 25:5-8). Plaintiff Gutierrez spent money on parking fees, cleaning supplies, clothing, and tools. (Ex. 1-R, Gutierrez Depo. 42:2-8). Drivers’ expenses varied from day-to-day and week-to-week. (Ex. 1-AA, Sohmer Depo. 27:1-16, 27:24-28:7, Ex. 1-U, Horton Depo. 34:1-5; Ex. 1-N, Edwards Depo. 34:6-35:12; Ex. 1-G, Baouch Depo. 29:5-29:15; Ex. 1-W, Larrow Depo. 41:7-42:6).

Drivers in the per diem program did not have to provide receipts or keep any records of the expenses they incurred while driving for Werner. (Ex.1-KK, WRN-BAOUCH00002616, Company Driver Per Diem Program; Ex. 1-W, Larrow Depo. 46:8-47:9; Ex. 1-AA, Sohmer Depo., 27: 17-23; p. 44:1-9; Ex. 1-U, Horton Depo. 33:22-34:1; Ex. 1-N, Edwards Depo. 37:24-38:5; Ex. 1-G, Baouch Depo. 28:25-29:4). Plaintiffs did not keep receipts or records of amounts they spent while over the road. (Ex. 1-S, Head Depo. 21:4-7; Ex. 1-J, Calhoun Depo. 41:25-42:4; Ex. 1-P, Foster Depo. 24:21-25; 28:11-13; Ex. 1-BB, Vega Depo. 35:3-7; Ex. 1-CC, Oluande Depo. 21:6-8; Ex. 1-DD, Walker Depo. 11:25-12:7; Ex. 1-K, Conner Depo. 17:7-9; 26:5-10; Ex. 1-F, Anderson Depo. 19:13-21; Ex. 1-M, Eden Depo. 18:25-19:6; Ex. 1-U, Horton Depo. 33:22-25; Ex. 1-N, Edwards Depo. 37:24-38:5; Ex. 1-AA, Sohmer Depo. 27:17-23; 44:1-3; Ex. 1-T, Hindes Depo. 22:20-23; Ex. 1-X, Minenga Depo. 14:1-6; Ex. 1-I, Byrd Depo. 28:2-6; Ex. 1-FF, Winkler Depo. 17:18-24; Ex. 1-O, Encinas Depo. 15:12-16; Ex. 1-EE, Williams Depo. 21:24-22:3; Ex. 1-V, Kinnison Depo. 25:19-22; Ex. 1-G, Baouch Depo. 28:25-29:4). Drivers who chose to enroll in the per diem program did not have to prove they actually spent *any money at all* on expenses to receive the per diem payment. (Filing 92-1, Tisinger Aff., ¶5). There were no restrictions on how much or how little drivers could spend or what they could buy while over the road. (*See*, *e.g.*, Ex. 1-L, Cortez Depo. 27:13-17; Ex. 1-S, Head Depo. 21:8-11; Ex. 1-BB, Vega Depo. 34:19-22; Ex. 1-K, Conner Depo. 24:18-23; Ex. 1-T, Hindes Depo. 22:15-19; Ex. 1-X, Minenga Depo. 15:11-21).

B. Claims Alleged.

Plaintiffs claim the non-taxable per diem portion of drivers' pay does not qualify as a wage for minimum wage purposes. (*See* Filing 23, First Amended Complaint, ¶47-49). Plaintiffs also claim Werner unlawfully failed to pay drivers for certain off-duty time spent in the sleeper berth and on short rest breaks. (*See generally* Filing 23, First Amended Complaint, ¶46).

III. ARGUMENT

A. Plaintiffs' claim that the per diem payments should be considered actual reimbursements rather than wages cannot be resolved on a classwide basis.

This case should be decertified because the expenses incurred by the over 50,000 drivers varied from day to day and driver to driver, so Plaintiffs' claims cannot be proven on a classwide basis. To establish that per diem payments are not wages, as Plaintiffs claim, Plaintiffs must prove the per diem payments received by the over 50,000 drivers in the class reasonably approximated expenses those drivers actually incurred on Werner's behalf or solely by reason of actions taken for the convenience of Werner. 29 C.F.R. § 778.217(a).

Plaintiffs cannot establish these claims on a classwide basis because the law "requires **each employee's** expenses to be examined **on a case by case basis** to see whether the 'per diem' is appropriate and reasonable" *for that employee*. *Berry v. Excel Group, Inc.*, 288 F.3d 252, 254 (5th Cir. 2002) (emphasis added). A plaintiff cannot establish that the per diem is a reasonable approximation of actual expenses merely by showing that an employer pays the same per diem amount for all employees. *Berry*, 288 F.3d at 254.

In *Picton v. Excel Group, Inc.*, the court determined a party cannot prove a per diem reasonably approximated expenses for a group of employees because "**nothing in the FLSA permits employers to approximate per diem payments on a group, rather than on an individual, basis**." *Id.* at 712 (emphasis added). According to the court, "an inspection of the plain text of the FLSA reveals the FLSA permits employers to approximate per diem payments **in terms of individual employees only**." *Id.* (emphasis added). The court noted that the FLSA defines the term employee as an "individual." *Id.* The court also noted 29 C.F.R. § 778.217, upon which Plaintiffs rely here, addresses expenses that are incurred by "the employee" (singular) and not employees (plural). *Id.* Based on this language, the court held that whether a per diem payment reasonably approximates **each individual employee's actual expenses** must be determined on an **employee by employee** basis. *Id.*

The Fifth Circuit has also held that a party cannot establish that a per diem payment reasonably approximates the amount of expenses an employee actually incurred merely by showing the employer paid the same per diem amount to each employee. *Berry*, 288 F.3d at 253. In *Berry*, the Fifth Circuit reasoned that to determine whether a per diem payment reasonably approximates any given employee's expenses requires that "**each** employee's expenses" be examined "case-by-case." The court examined the cost of the plaintiff's daily commute, including miles traveled and the frequency of the commute, the cost of the plaintiff's temporary lodging, and other individualized evidence to determine whether the per diem reasonably approximated the employee's expenses. *Id. See also Logan v. Rocky Mountain Rental*, 3 Neb. App. at 174, 524 N.W.2d at 818 (1994) (conducting an individualized analysis into the expenses actually incurred by the plaintiff truck driver; whether the expenses he incurred were equal to or less than his daily per diem payment; and whether the plaintiff actually incurred expenses for each day he received the per diem; and concluding the per diem payment was a wage).

The analysis is the same in this class action. Courts have refused to certify cases involving employee expenses because the variation in the type and amount of expenses incurred by each employee renders class treatment unmanageable. *See, e.g.*, *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1022 (N.D. Cal. 2010) (denying certification because "there may be substantial variance as to what kind of expenses were even incurred" and due to the difficulty of determining the necessity of the variety of expenses on a classwide basis); *Norris-Wilson v. Delta-T Group, Inc.*, 270 F.R.D. 596, 610, 2010 U.S. Dist. LEXIS 104564, *38 (S.D. Cal. 2010) (denying Rule 23 class certification on a claim for expense reimbursements because the claims would "necessarily require[] a worker-by-worker, highly individual analysis").

Here, too, individual issues regarding whether per diem payments for over 50,000 drivers constitute wages cannot be determined on a classwide basis. *See* Fed. R. Civ. P. 23(a) & (b). The class should be decertified.

B. It is unreasonable to assume each of the over 50,000 drivers in the class spent the same amount every day.

It is unreasonable to assume any driver actually spent the same amount on meals and incidental expenses each and every day, week after week. Under 29 C.F.R. § 778.217, upon which Plaintiffs rely, Plaintiffs must show a driver's per diem payment “reasonably approximates the expenses incurred” by the driver. 29 C.F.R. § 778.217(a). (*See also* Filing 23, First Amended Complaint, ¶48 (relying on 29 C.F.R. § 778.217)). That regulation states:

> Where an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer…Payments made to cover such expenses are not included in the employee's regular rate (**if the amount of the reimbursement reasonably approximates the expenses incurred**). Such payment is not compensation for services rendered by the employees during any hours worked in the workweek.

29 C.F.R. § 778.217(a) (emphasis added).

Plaintiffs cannot show the per diem payments they received reasonably approximated the expenses they actually incurred over the road because they have no evidence of what any driver actually spent over the road. The drivers did not keep records of what they spent while over the road. (Ex. 1-S, Head Depo. 21:4-7; Ex. 1-J, Calhoun Depo. 41:25-42:4; Ex. 1-P, Foster Depo. 24:21-25; 28:11-13; Ex. 1-BB, Vega Depo. 35:3-7; Ex. 1-CC, Oluande Depo. 21:6-8; Ex. 1-DD, Walker Depo. 11:25-12:7; Ex. 1-K, Conner Depo. 17:7-9; 26:5-10; Ex. 1-F, Anderson Depo. 19:13-21; Ex. 1-M, Eden Depo. 18:25-19:6; Ex. 1-U, Horton Depo. 33:22-25; Ex. 1-N, Edwards Depo. 37:24-38:5; Ex. 1-AA, Sohmer Depo. 27:17-23; 44:1-3; Ex. 1-T, Hindes Depo. 22:20-23; Ex. 1-X, Minenga Depo. 14:1-6; Ex. 1-I, Byrd Depo. 28:2-6; Ex. 1-FF, Winkler Depo. 17:18-24; Ex. 1-O, Encinas Depo. 15:12-16; Ex. 1-EE, Williams Depo. 21:24-22:3; Ex. 1-V, Kinnison Depo. 25:19-22; Ex. 1-G, Baouch Depo. 28:25-29:4). Not one driver, let alone each of the over 50,000 drivers in the class, actually spent the same amount on meals and incidental expenses every day or every week. Each driver has different eating habits and spending habits. Numerous drivers also carry coolers of food and drinks in their trucks to reduce their daily expenses. (Ex. 1-P, Foster Depo. 25:24-26:1; Ex. 1-CC, Oluande Depo. 22:14-20; 24:3-6; Ex. 1-K, Conner Depo. 17:22-25; Ex. 1-N, Edwards Depo. 35:4-12; Ex. 1-H, Blanker Depo. 13:12-20, 13:21-14:2; Ex. 1-V, Kinnison Depo. 22:1-24; Ex. 1-Q, Fregoso Depo. 37:18-20).

Drivers estimated they spent $30 or $40 per day, including meals. (Ex. 1-CC, Oluande Depo. 21:9-13; 21:20-22; Ex. 1-U, Horton Depo. 37:25-38:3; Ex. 1-H, Blanker Depo. 13:3-7; Ex. 1-X, Minenga Depo. 14:6-8; 14:25-15:3; Ex. 1-V, Kinnison Depo. 21:8-15l 21:16-19; Ex. 1-E, Alicea Depo. 10:17-25). However, some drivers ate three meals per day, while other drivers only ate one or two meals per day. (Ex. 1-BB, Vega Depo. 39:24-40:2; Ex. 1-T, Hindes Depo. 23:15-17; Ex. 1-AA, Sohmer Depo. 43:8-9; Ex. 1-V, Kinnison Depo. 21:16-25 ("You don't eat three hefty meals every day, especially when you're driving."). Drivers have access to fast food restaurants and other restaurants where a driver can purchase a meal for less than $8.00. (*See generally* Ex. 1-MM - Excerpts from Werner's Fuel Stop Book, WRN-BAOUCH000018467-82; Ex. 1-OO - Information Regarding Resources Available to Drivers, Quick-Service Restaurants Available at Love's Truck Stops, WRN-BAOUCH000018987; Fresh Food at Pride, WRN-

BAOUCH000018783-18784; Pilot Flying J Restaurants, WRN-BAOUCH000018992-18993; TA and Petro Stopping Centers; WRN-BAOUCH00019017-19022; Longway's Diner Menu, WRN-BAOUCH000018983-84; Charlie's Family Dining Menu, WRN-BAOUCH000018991; Apple Barrel Restaurant Menu, WRN-BAOUCH000018997; Schatz Truck Stop Menu, WRN-BAOUCH00018999-19005; Ex. 1-L, Cortez Depo. 25:13-19; Ex. 1-V, Kinnison Depo. p. 26:8-27:5; Ex. 1-P, Foster Depo. 42:15-22). Drivers may take advantage of the lower prices at those restaurants on any day.

Plaintiffs' admitted – and their estimates of expenses confirm -- the amounts drivers spent on expenses varied by day and by week. (Ex. 1-S, Head Depo. 25:6-10; Ex. 1-P, Foster Depo. 28:5-7; Ex. 1-BB, Vega Depo. 44:8-19; Ex. 1-DD, Walker Depo. 12:11-14; Ex. 1-Y, Peterson Depo. 18:23-25; Ex. 1-K, Conner Depo. 17:17-21; Ex. 1-M, Eden Depo. 19:7-12; Ex. 1-U, Horton Depo. 37:25-38:3; Ex. 1-N, Edwards Depo. 34:19-21; Ex. 1-AA, Sohmer Depo. 28:5-7; 42:22-43:1; Ex. 1-T, Hindes Depo. 23:6-7; Ex. 1-E, Alicea Depo. 11:4-6). Although some drivers estimated they spent up to $15 per day for showers, many drivers had access to free showers. (*See* Ex. 1-MM - Excerpts from Werner's Fuel Stop Book, WRN-BAOUCH000018459; Ex. 1-NN - Werner Terminal Information, WRN-BAOUCH00018413-00018451; Ex. 1-O, Encinas Depo. 15:17-20; 15:23-25; Ex. 1-W, Larrow Depo. 42:1-6; Ex. 1-Q, Fregoso Depo. 30:10-11). Shower expenses varied from $0 to $15 depending on the driver and the location where the driver showered. (Ex. 1-O, Encinas Depo. 15:17-20; 15:23-25; Ex. 1-W, Larrow Depo. 42:1-6; Ex. 1-Q, Fregoso Depo. 30:10-11; Ex. 1-MM - Excerpts from Werner's Fuel Stop Book, WRN-BAOUCH000018459).

Contrary to the overwhelming evidence of the varying amounts spent by drivers while over the road, Plaintiffs assume (a) each driver actually spent the same amount on expenses each and every day while over the road; and (b) Werner's per diem payment reasonably approximates the expenses each of the over 50,000 drivers actually incurred. (*See*, *e.g.*, Filing No. 242, Plaintiffs' Brief in Support of Motion for Summary Judgment, p. 34). Plaintiffs have no evidence of what any driver's actual expenses were on any day. (*See, e.g.*, Ex. 1-S, Head Depo. 21:4-7; Ex. 1-J, Calhoun Depo. 41:25-42:4; Ex. 1-P, Foster Depo. 24:21-25; 28:11-13; Ex. 1-BB, Vega Depo. 35:3-7; Ex. 1-CC, Oluande Depo. 21:6-8; Ex. 1-DD, Walker Depo. 11:25-12:7; Ex. 1-K, Conner Depo. 17:7-9; 26:5-10; Ex. 1-F, Anderson Depo. 19:13-21; Ex. 1-M, Eden Depo. 18:25-19:6).

Plaintiffs rely on estimates made by Werner to the IRS to obtain IRS approval of Werner's per diem program as an accountable plan. (*See*, *e.g.*, Filing 242, Plaintiffs Brief in Support of Motion for Class Certification, p. 7-12). In the context of an accountable plan under IRS regulations, Werner prospectively estimated that drivers may incur certain expenses "in connection with" their work. 26 C.F.R. Reg. § 1.62-2(d)(3)(i). This estimate was based on input from three drivers, a fleet manager, and data from the U.S. General Services Administration. (*See* Ex. 1-B, Wingert Depo. 99:5-11; 14:10-15; 97:12-25; Ex.1-GG, Tax Dept. Memorandum from Jeff Wingert to Deb Walker, WRN-BAOUCH00013758-13759; Tax Dept. Memorandum from Jeff Wingert, WRN-BAOUCH00013787-13789). Werner's estimate to the IRS as to the amount of expenses drivers may incur **in the future** does not prove what any of the over 50,000 drivers in the class **actually incurred**. 29 C.F.R. § 778.217(a); *Picton*, 192 F. Supp. 2d at 712.

An employer's general estimate of the amount of expenses a group of employees may incur is insufficient to prove the amount of expenses *actually incurred* by any employee under the FLSA. *Picton*, 192 F.Supp.2d at 711-715. In *Picton*, the employer conducted a study to estimate the amount of expenses workers could incur at a single worksite**.** *Id.* at 711-12. The court found the employer's study could not be used to establish the amount of expenses the plaintiff *actually incurred*. *Id.* at 711-12. The court reasoned there is "nothing in the FLSA that permits employers to approximate per diem payments on a group, rather than on an individual, basis." *Picton*, 192 F. Supp. 2d at 712.

Here, Werner's estimate of expenses - which is based on input from three drivers, a fleet manager, and data from the U.S. General Services Administration - does not prove the expenses actually incurred by the over 50,0000 drivers throughout the country, who drive different routes in different regions of the country and have different eating and spending habits. (*See* Ex. 1-B, Wingert Depo. 14:10-15; 97:12-25; Ex.1-GG, Tax Dept. Memorandum from Jeff Wingert to Deb Walker, WRN-BAOUCH00013758-13759; Tax Dept. Memorandum from Jeff Wingert, WRN-BAOUCH00013787-13789). Drivers' expenses varied dramatically from day-to-day and season-to-season, depending on where they eat, what they order, and whether the driver kept a cooler, stove, or water heater in the truck. Several Plaintiffs admit the per diem **does not** reasonably approximate their estimates of what they spent. *Picton*, 192 F. Supp. 2d at 712. (*See also* Ex. 1-CC, Oluande Depo. 21:9-13; 21:20-22 ($30 to $50 per day); Ex. 1-U, Horton Depo. 37:25-38:3 ($40 to "maybe $50 a day"); Ex. 1-H, Blanker Depo. 13:3-7 ($40 to $45 per day); Ex. 1-X, Minenga Depo. 14:6-8; 14:25-15:3 ($40 to $45 per day); Ex. 1-V, Kinnison Depo. 21:8-15l 21:16-19 (some days he spent less than $40); Ex. 1-E, Alicea Depo. 10:17-25 (about $40 per day)).

Plaintiffs rely on *Mundell v. DBA/DMC Mining Servs. Corp.* to suggest that whether a per diem is reasonable does not require an individual analysis, but the facts of that case are distinguishable from this case. 2014 U.S. Dist. LEXIS 182412, *1 (M.D. Pa. Apr. 2, 2014). (*See* Filing 99, Reply Brief in Support of Plaintiffs' Motion for Class and Conditional Certification, pp. 16-17). *Mundell* involved a claim by a single employee in a single work location who claimed his per diem payment exceeded his actual expenses. *Mundell*, 2014 U.S. Dist. LEXIS 182412, *4-5. The *Mundell* court noted that "a determination of [the] reasonableness [of a per diem payment] is **a fact-based inquiry**." *Id.* at 6 (emphasis added). The court determined the reasonableness of the per diem as a matter of law based on the undisputed facts of that case. *Id.* Notably, the court determined the per diem amount was an objectively reasonable approximation in large part because the federal government had issued **localized** per diem rates for the county in which the plaintiff worked. *Id.* at *7-8. Here, there is no localized per diem rate for the over 50,000 drivers in the class, who may drive anywhere in the lower 48 states.

Moreover, the *Mundell* court permitted the plaintiff to amend his complaint to raise the claim that per diem payments were made for personal expenses rather than excludable reimbursements. *Id.* at *11. Here, certain expenses claimed by Plaintiffs are personal expenses, rather than excludable reimbursements, and the nature of each of those expenses must be assessed on an individualized basis. (*See* Part II.C, supra and Part III.D, infra).

Plaintiffs have also previously relied on a partial summary judgment ruling in *Gerald Davis v. Louis Broadwell*, Case 2:10-cv-02947 (D. S.C., Oct. 11, 2011) for the proposition that their claims can be proved on a classwide basis. However, the district court's holding in that case is not persuasive because the parties themselves later stipulated that the ruling should be vacated. See Case 2:10-cv-02947, Filing 207-1, Settlement Agreement p. 6, ¶5.

The only way to determine whether a per diem reasonably approximates actual expenses is to compare each employee's actual weekly expenses to the actual per diem pay received that week. *See Picton*,192 F.Supp.2d at 711-14. Because damages can only be determined by conducting a highly individualized inquiry into the amounts actually spent by each driver, the class should be decertified. 29 C.F.R. § 778.217(a).

C. Whether the amount of the per diem exceeded the expenses a driver actually incurred on any given day requires individual analysis.

Under 29 C.F.R. § 778.217(c), any portion of an expense reimbursement that exceeds actual expenses counts as a wage. That regulation states:

> Payments excluding expenses. It should be noted that only the actual or reasonably approximate amount of the expense is excludable from the regular rate. If the amount paid as "reimbursement" is disproportionately large, **the excess amount will be included in the regular rate**.

29 C.F.R. § 778.217(c) (emphasis added). To prove the per diem payment is not a wage, Plaintiffs must prove the amount of the per diem payment earned by each driver did not exceed the expenses actually incurred by that driver during the same pay period. 29 C.F.R. § 778.217(c); *see e.g., Berry v. Excel Group, Inc.*, 288 F.3d 252, 253 (5th Cir. 2002); *Marshal v. Truman Arnold Distributing Co., Inc.*, 640 F.2d 906, 909 (8th Cir. 1981); *Picton v. Excel Group*, 192 F.Supp.2d 706, 710-714 (E.D. Tex. 2001); *see also, e.g.*, 29 C.F.R. §778.217(a). This requires Plaintiffs to prove the amount of expenses actually incurred by each driver each week and compare that amount to the amount of the per diem payment, for each of the over 50,000 drivers. Conducting this analysis for 50,000 drivers requires individual inquiries that are not suitable for classwide treatment.

Plaintiffs did not keep records of the actual expenses they incurred. (Ex. 1-S, Head Depo. 21:4-7; Ex. 1-J, Calhoun Depo. 41:25-42:4; Ex. 1-P, Foster Depo. 24:21-25; 28:11-13; Ex. 1-BB, Vega Depo. 35:3-7; Ex. 1-CC, Oluande Depo. 21:6-8; Ex. 1-DD, Walker Depo. 11:25-12:7; Ex. 1-K, Conner Depo. 17:7-9; 26:5-10; Ex. 1-F, Anderson Depo. 19:13-21; Ex. 1-M, Eden Depo. 18:25-19:6). Common sense dictates, and Plaintiffs' expense estimates confirm, that the amount of expenses incurred by each driver varied day-to-day and week-to-week. (Ex. 1-AA, Sohmer

Depo. 26:11-27:16, 27:24-28:7, 42:4-43:1; Ex. 1-U, Horton Depo. 34:1-5 & 37:25-38:3; Ex. 1-N, Edwards Depo. 34:6-35:12; Ex. 1-G, Baouch Depo. 29:5-29:15; Ex. 1-W, Larrow Depo. 41:7-42:6; Ex. 1-CC, Oluande Depo. 21:9-13; 21:20-22; Ex. 1-U, Horton Depo. 37:25-38:3; Ex. 1-H, Blanker Depo. 13:3-7; Ex. 1-X, Minenga Depo. 14:6-8; 14:25-15:3; Ex. 1-V, Kinnison Depo. 21:8-15l 21:16-19; Ex. 1-E, Alicea Depo. 10:17-25). The wide variation in drivers' estimates of their expenses confirms there is no way to determine or approximate the amounts each driver actually incurred for meals and incidental expenses each day on a classwide basis. (*Compare* Ex. 1-CC, Oluande Depo. 21:9-13; 21:20-22; Ex. 1-H, Blanker Depo. 13:3-7; Ex. 1-X, Minenga Depo. 14:6-8; 14:25-15:3; *with* Ex. 1-BB, Vega Depo. 39:20-23; 40:22-41:4; Ex. 1-Y, Peterson Depo. 18:6-11; Ex. 1-F, Anderson Depo. 21:7-11).

The amount of the per diem payments paid to drivers is also an individual issue. The amount of the per diem payments to qualified drivers was based on miles driven. (Ex.1-KK, WRN-BAOUCH00002616, Company Driver Per Diem Program; WRN-BAOUCH00011754-11755 - Per Diem Program). It follows that the per diem payments varied for each qualified driver by day and by week. (*Id.*; *see also* Ex. 1-JJ - Excerpts of Pay Statements, Edwards, WRN-BAOUCH00006819-6821). The per diem payments to student drivers similarly varied in amount, from driver to driver and day to day. (*See, e.g.*, Ex. 1-JJ - Excerpts of Pay Statements, Edwards, WRN-BAOUCH00006805-06; Neely, WRN-BAOUCH00005693-95). An employee-by-employee and week-to-week analysis would be required to determine the per diem amounts paid to each driver.

Even if the drivers had records of the expenses they incurred (they do not), it would be a monumental task to compare each driver's actual expenses each week with his per diem payment for that same week, to determine whether the per diem payments were more than the actual expenses. There is no way to complete this analysis for over 50,000 drivers. Because Plaintiffs cannot prove any driver's actual expenses and cannot prove the expenses did not exceed the amount of the per diem for any of the over 50,000 drivers, the class should be decertified.

D. Whether an expense is for the benefit of the driver or for the benefit of Werner must be determined on an expense-by-expense basis.

Setting aside the fact that per diem payments are wages, under Plaintiffs' theory, whether some or all expenses were incurred on the employer's behalf must be determined on a driver-to-driver and expense-by-expense basis. Under 29 C.F.R. § 778.217(a), an expense is only reimbursable if it is incurred "on [the] employer's behalf" or "solely by reason of action taken for the convenience of [the] employer." If the employer reimburses an employee "for expenses normally incurred by the employee for his own benefit, [the employer] is, of course, increasing the employee's regular rate" and the payment counts as a wage. 29 C.F.R. § 778.217(d). Plaintiffs must prove the expenses for all 50,000 drivers were "incurred on Werner's behalf" and were not normal living expenses. 29 C.F.R. 778.217(a) & (d); *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228, 1243 (11th Cir. 2002).

Plaintiffs' expenses varied widely by driver. Plaintiffs testified they spent money on anything from cigarettes to earpieces for their phones. (Ex. 1-W, Larrow Depo. 46:15-20; Ex. 1-Z, Rembert Depo. 14:14-19). Drivers' expenses included cell phones, gloves, clothing, flashlights, jackets, and rain gear. (Ex. 1-E, Alicea Depo. 11:1-3; Ex. 1-W, Larrow Depo. 41:14-17; Ex. 1-AA, Sohmer Depo. 27:4-16; Ex. 1-R, Gutierrez Depo. 42:2-8). Plaintiffs' expenses also included cleaning supplies, showers, laundry, razor blades, toothpaste, a water heater, and a stove. (Ex. 1-X, Minenga Depo. 15:4-10; Ex. 1-P, Foster Depo. 25:5-8; Ex. 1-R, Gutierrez Depo. 42:2-8). Additionally, with regard to meal expenses, at least one court has held that meals consumed by an over-the-road truck driver are not incurred solely in connection with the performance of services for the employer. *See, e.g.*, *Scyphers v. H&H Lumber*, 237 Mont. 424, 774 P.2d 393 (Mont. 1989) (concluding per diem payments to a truck driver were wages for worker's compensation purposes and noting that although "he ate meals on the road, this expense certainly continued after he was laid off; that is, **his meal expense was not tied exclusively to his job**") (emphasis added). There are additional individual issues related to whether the total meal expenses claimed by each driver primarily benefitted Werner. Some drivers testified they spent as little as $30/per day while traveling, while other drivers claimed they spent in excess of $60 per day. Drivers had access to fast-food restaurants at hundreds of truck stops throughout the country and to restaurants where they could purchase meals for under $8.00. Drivers could also bring coolers to reduce their meal expenses. Accordingly, there are individual issues as to how much, if any, of a driver's meal expense benefitted Werner.

Even under Plaintiffs' theory, several of the expenses Plaintiffs claimed they incurred over the road are in the nature of normal living expenses that were not incurred "on Werner's behalf." *See* 29 C.F.R. 778.217(a) & (d). (*See, e.g.*, Ex. 1-Z, Rembert Depo. 14:14-19; Ex. 1-E, Alicea Depo. 11:1-3; Ex. 1-W, Larrow Depo. 41:14-17; 46:15-20; Ex. 1-AA, Sohmer Depo. 27:4-16; Ex. 1-X, Minenga Depo. 15:4-10). Even the IRS cautioned Werner that the costs of showers, laundry, and parking fees should not be considered reimbursable expenses. (*See* Ex.1-GG, Tax Dept. Memorandum from Jeff Wingert to John Steele and Bob Synowicki, WRN-BAOUCH00013760). There are significant individual issues about whether showers, laundry, or other expenses were incurred on Werner's behalf. (*See id.*). Because the types of expenses vary by driver, there is no way to determine on a classwide basis whether drivers' expenses were a normal living expense or for Werner's benefit. *See Harris v. Vector Mktg. Corp.*, 753 F. Supp.

2d 996, 1022-1023 (N.D. Cal. 2010) (denying class certification on an expense claim in part due to the difficulty of determining whether the various expenses incurred by employees were necessary for their jobs).

In *Harris*, the plaintiff claimed her employer failed to reimburse all sales representatives for the expenses they incurred for their job. *See Harris*, 753, F. Supp. 2d at 1022-1023. The court denied class certification due to the overwhelming individual issues associated with the claim. *Id.* The court reasoned:

> [T]here may be substantial variance as to what kind of expenses were even incurred by Sales Representatives in the first place. Some Sales Representatives may have used a personal car; others may not have (*e.g.*, they may have taken a bus or walked). Some Sales Representatives may have used a cell phone; others may not have (*e.g.*, used a phone at the Vector local office). And even if all Sales Representatives used cell phones, the plans likely differed (*e.g.*, some may have had a flat rate, while others may have incurred extra charges). Furthermore, some Sales Representatives may have incurred expenses the necessity of which is likely to be challenged (*e.g.*, purchasing clothing).

Harris, 753 F. Supp. 2d at 1022.

Here, too, Plaintiffs must prove each expense was incurred for Werner's benefit and not their own. 29 C.F.R. § 778.217(a) & (d). At a minimum, there are individual issues about whether earpieces, cigarettes, cell phones, or showers are for Werner's benefit. Plaintiffs also cannot estimate or prove the amount of expenses incurred without proving what expenses they have included within those amounts. To determine the amounts of expenses drivers incurred while over the road, Plaintiffs must prove the nature of each and every expense incurred.

Plaintiffs cannot prove everything drivers purchased while over the road benefitted Werner by simply relying on the fact that Werner estimated drivers may incur expenses over the road as part of establishing its per diem program. (*See* Filing No. 242, Plaintiffs' Brief in Support of Motion for Summary Judgment, pp. 7-9). Plaintiffs admit they have no records of the expenses they incurred over the road. (Ex. 1-S, Head Depo. 21:4-7; Ex. 1-J, Calhoun Depo. 41:25-42:4; Ex. 1-P, Foster Depo. 24:21-25; 28:11-13; Ex. 1-BB, Vega Depo. 35:3-7; Ex. 1-CC, Oluande Depo. 21:6-8; Ex. 1-DD, Walker Depo. 11:25-12:7; Ex. 1-K, Conner Depo. 17:7-9; 26:5-10; Ex. 1-F, Anderson Depo. 19:13-21; Ex. 1-M, Eden Depo. 18:25-19:6). Plaintiffs' purchases varied from driver-to-driver and day-to-day. (Ex. 1-AA, Sohmer Depo. 26:11-27:16, 27:24-28:7, 42:4-43:1; Ex. 1-U, Horton Depo. 34:1-5 & 37:25-38:3; Ex. 1-N, Edwards Depo. 34:6-35:12; Ex. 1-G, Baouch Depo. 29:5-29:15; Ex. 1-W, Larrow Depo. 41:7-42:6; Ex. 1-CC, Oluande Depo. 21:9-13; 21:20-22; Ex. 1-U, Horton Depo. 37:25-38:3; Ex. 1-H, Blanker Depo. 13:3-7; Ex. 1-X, Minenga Depo. 14:6-8; 14:25-15:3; Ex. 1-V, Kinnison Depo. 21:8-15l 21:16-19; Ex. 1-E, Alicea Depo. 10:17-25). Drivers did not incur the same amount or type of expense every day. (*See* Ex. 1-Z, Rembert Depo. 14:14-19; Ex. 1-E, Alicea Depo. 11:1-3; Ex. 1-W, Larrow Depo. 41:14-17; 46:15-20; Ex. 1-AA, Sohmer Depo. 27:4-16; Ex. 1-X, Minenga Depo. 15:4-10).

Not only do expenses vary among drivers, but the estimate on which Plaintiffs rely was made under the IRS standard for business expenses, not the FLSA standard. The standards are different. *Compare* Treas. Reg. § 1.62-2(d) with 29 C.F.R. § 778.217(a). Under IRS regulations, Werner prospectively estimated the type of expenses a driver might incur "**in connection with the performance of services as an employee of the employer.**" 26 C.F.R. § 1.62-2 (emphasis added). The FLSA requires that Plaintiffs look back to show what expenses were actually incurred by the over 50,000 different drivers over the class period and prove each of those expenses was incurred on Werner's behalf. 29 C.F.R. §778.217(a). Because the standards under the IRS and FLSA regulations are different, courts have reasoned that whether a payment qualifies as a reimbursement for tax purposes has no bearing on whether the same payment qualifies as a reimbursement (and not a wage) in the labor context. *See, e.g.*, *Logan v. Rocky Mountain Rental*, 524 N.W.2d 816, 820 (Neb. 1994) (whether a payment is taxable income under tax regulations was not determinative of whether the same payment qualified as a wage to the employee); *Plane Techs v. Keno*, 103 Ark. App. 121, 286 S.W.3d 774 (Ark. Ct. App. 2008) (concluding a non-taxable per diem payment was a wage, notwithstanding the fact it did not count as taxable income, because "calling this salary per diem was simply a legal way under the federal and state tax code whereby the employer could boost the employee's take-home pay[.]") (quotation omitted); *S. S. Kresge Co. v. United States*, 218 F. Supp. 240, 243 (E.D. Mich. 1963) (stating, in a tax case, that "what might not be taxable income for income tax purposes might constitute wages" under other applicable law).

Plaintiffs must prove that each expense incurred by each driver in each week primarily benefited Werner. *See generally* 29 C.F.R. § 531.32(c) & §778.217(a). This individual inquiry would make trying this case on a classwide basis impossible. The class should be decertified.

E. There are individual issues related to Werner's affirmative defenses that cannot be resolved on a classwide basis.

Because many class members claimed in workers' compensation proceedings that the per diem payment is a wage, they are estopped from claiming otherwise here. *See, e.g., Barrington Corp. v. Dep't of Revenue*, 765 N.W.2d 448, 455 (Neb. 2009). The doctrine of estoppel "protects the integrity of the judicial process." *Total Petroleum, Inc. v. Davis,* 822 F.2d 734, 738 n.6 (8th Cir. 1987). A party who takes a certain position in a legal proceeding, and succeeds in maintaining that position, is prohibited from thereafter assuming a contrary position "simply because his interests have changed," especially if doing so prejudices the other party. *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001). To determine whether estoppel should be invoked, a court may consider: (1) whether a party's later position is inconsistent with its earlier position; (2) whether the party succeeded in persuading a court to accept its earlier position; and (3) whether the party asserting the new position would derive an unfair advantage or impose an unfair detriment if not estopped. *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1047 (8th Cir. 2006).

Many class members, including several opt-in Plaintiffs, are estopped from claiming the per diem is not a wage because they accepted worker's compensation benefits calculated with the per diem included as a wage. (Ex. 1-II - Average Weekly Wage Calculations for Plaintiffs & Class Members, WRN-BAOUCH00017637-17828). Workers' compensation benefits are calculated based on the amount of wages an employee has been paid. *See, e.g.,* Neb. Rev. Stat. § 48-121. By including per diem payments in wages, drivers received higher workers' compensation benefits. *See id.*; *see also* Ex. 1-II - Average Weekly Wage Calculations for Plaintiffs & Class Members, WRN-BAOUCH00017637-17828). For example, opt-in Plaintiff James Anderson filed a workers' compensation claim against Werner. (Ex. 1-F, Anderson Depo. 8:7-10; 8:17-25). As part of that case, Anderson claimed his per diem payments constituted a wage, and his benefits were based on an average weekly wage that included his per diem payments. (*See* Ex. 1-II - Average Weekly Wage Calculations for Plaintiffs & Class Members, WRN-BAOUCH00017723). Anderson's claim that the per diem should be included as a wage for his workers' compensation benefits is directly contrary to his allegations in this case, where he claims the per diem payments do *not* constitute a wage for purposes of assessing minimum wage compliance. (*See* generally Filing 23, First Amended Complaint).

Hundreds of class members also claimed a higher rate of benefits in their workers' compensation claims by claiming the per diem was considered part of their weekly wage. (*See* *generally* Ex. 1-II - Average Weekly Wage Calculations for Plaintiffs & Class Members, WRN-BAOUCH00017637-17828; Filing 92-1, Tisinger Aff. ¶¶7-10 & Exhibits A-D to Tisinger Aff.). Because drivers received higher workers' compensation benefits by including the per diem payments as wages, they should be estopped from now taking a contrary position by arguing that the per diem payments are not wages. *See Stallings*, 447 F.3d at 1047.

In addition, all class members who remained in the per diem program after receiving notice of this lawsuit are estopped from claiming damages following that notice. A driver may elect to quit the per diem program by completing a single form and submitting it to Werner. (*See* Ex.1-KK, WRN-BAOUCH00011755, Per Diem Program; *see also* Ex. 1-N, Edwards Depo. 67:2-14). The driver will then be removed from the per diem program at the start of the next calendar year. (*See* Ex.1-KK, WRN-BAOUCH00011755, Per Diem Program). Each class member was mailed notice of this lawsuit on October 28, 2014. (Filing 145, Order).

All Plaintiffs received the benefit of the per diem program by receiving higher take home pay while enrolled in the program. They now seek to double the amount of pay they received under the per diem program by claiming the per diem payments were not wages. (Filing No. 23, First Amended Complaint, ¶47-49). Some Plaintiffs seek even greater damages by remaining in the per diem program after asserting their claims here. Two of the 31 drivers deposed admitted they not only remained in the program after receiving notice of the action, but also opted into the collective action and continue to claim damages. (Ex. 1-P, Foster Depo. 22:16-18; Ex. 1-M, Eden Depo. 20:5-7; Filing 155-1, p. 22, Eden Consent Form). Any driver who remained in the per diem program after receiving notice of this lawsuit has acquiesced to the program and is now estopped from claiming damages after January 1, 2015, the date on which the driver could have been removed from the program.

Fundamental fairness requires Werner must be permitted to offer individual evidence of its defenses, so the jury can determine whether each driver is estopped from claiming damages because the driver's own actions are inconsistent with the claims he makes here. Because these defenses involve individual issues, they cannot be handled on a classwide basis and the class should be decertified.

F. Plaintiffs do not have admissible evidence to prove damages on a classwide basis.

The class should be decertified because Plaintiffs do not have admissible evidence to prove damages can be reliably calculated on a classwide basis. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1431 n.4 & 1432-33 (2013); *Bussey v. Macon County Greyhound Park, Inc.*, 562 F. App'x 782, 789-91 (11th Cir. 2014); *Espenscheid v. Directsat USA, LLC*, 705 F.3d 770, 774-76 (7th Cir. 2013). Decertification is appropriate where plaintiffs fail to present evidence of a workable damage model. *See In re Med. Waste Servs. Antitrust Litig.*, No. 2:03MD1546 DAK, 2006 WL 538927, at *8 (D. Utah Mar. 3, 2006); *see also, e.g., Brazil v. Dole Packaged Foods, LLC*, No. 12-CV-01831-LHK, 2014 WL 5794873, at *14 (N.D. Cal. Nov. 6, 2014) (decertifying a class because the damage model used by the plaintiffs' expert was fundamentally flawed and "fails to provide a means of showing damages on a class wide basis through common proof"); *Cowden v. Parker & Associates, Inc.*, No. CIV.A. 5:09-323-KKC, 2013 WL 2285163, at *7 (E.D. Ky. May 22, 2013) (denying class certification, noting "Plaintiffs have offered no manageable way to calculate damages across the entire class").

Werner filed a Motion to exclude the damage calculations and testimony of Plaintiffs' expert, Robert Speakman. (Filings 307-309). Speakman's testimony should be excluded because Plaintiffs did not produce a computation of the number of hours allegedly worked at less than minimum wage for any driver - a required element of Plaintiffs' minimum wage claims. (See Filing 309, Brief in Support of Motion to Exclude Damage Calculations and Expert Testimony of Robert Speakman, pp. 16-24). Speakman's calculations are also inadmissible because Speakman used a regression analysis, which has never been admitted to prove damages in a wage-and-hour case. (*Id.* at pp. 24-26). The damages calculated for drivers using the drivers' actual log data confirm that Speakman's regression analysis is unreliable. (*Id.* at pp. 29-34). For these reasons, and for all the reasons explained in Werner's Brief in Support of Motion to Exclude Damage Calculations and Expert Testimony of Robert Speakman, Plaintiffs cannot prove damages on a classwide basis. (Filings 307-309). Where computing damages would "require[] separate mini-trials" and "render the case unmanageable," the class should be decertified. *Windham v. American Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977) (quotation omitted). *See also, e.g., In re St. Jude Med. Inc.*, 522 F.3d 836, 840-41 (8th Cir. 2008) (reversing an order granting class certification partially because individual issues would predominate over common issues during any determination of damages); *Owner Operator Independent Driver's Ass'n v. New Prime, Inc.*, 339 F.3d 1001, 1012 (8th Cir. 2003) (affirming the denial of class certification partially because damages would have to be determined based on facts specific to each class member).

G. The class should be decertified because the class contains members who did not suffer damages.

The class should also be decertified because the class definition encompasses numerous drivers who did not suffer damages, even under Plaintiffs' theory of the case. "[A] class cannot be certified if it contains members who lack standing" – i.e., individuals who did not suffer an injury as a result of the defendant's alleged conduct. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d

1023, 1034 (8th Cir. 2010). Similarly, if a class is originally certified and, "later in the litigation it becomes apparent that [the class] include[s] individuals who do not have standing," a court should decertify the class or amend the class definition. *Perrin v. Papa John's Int'l, Inc.*, 4:09CV01335 AGF, 2013 WL 6885334, *8 (E.D. Mo. Dec. 31, 2013) (citations omitted).

Here, Speakman's damage amounts reflect that thousands of drivers do not have any damages under any of Speakman's 12 different methods of computing damages. Those drivers were paid minimum wage, even when the per diem payments are not credited as wages for minimum wage purposes. (Ex. 1, Declaration of Elizabeth A. Culhane ("Culhane Decl.") ¶¶ 5-6). That number is artificially low, because the flaws in Speakman's model artificially increase damages for many drivers. (*See generally* Filing 309).

In a class action, every class member must have standing to bring the suit on his own behalf. *Avritt*, 615 F.3d at 1034; *Halvorson*, 718 F.3d at 779. In other words, every class member must have suffered an "injury in fact ... that is fairly traceable to the challenged action of the defendant, and likely [to] be redressed by a favorable decision." *In re Zurn*, 644 F.3d at 616 (citing *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009)). Because only those individuals who suffered injury have standing to sue, the class definition must exclude individuals who did not suffer damages as a result of the defendant's conduct. *Copp v. American Enter. Servs. Co.*, 4:11-CV-189, 2012 WL 1555097, at *2 (S.D. Iowa Apr. 24, 2012). The Court lacks jurisdiction over claims asserted on behalf of class members who did not suffer an injury as a result of the defendant's conduct. *In re Zurn*, 644 F.3d at 616 (internal citations omitted).

Here, the class certified by the Court includes all drivers enrolled in Werner's per diem program since November 27, 2008 (four years before Plaintiffs' Complaint was filed). (Filing 112, Second Memorandum and Order Nunc Pro Tunc, p. 9). In a minimum wage case, the plaintiff only has standing to sue if, as a result of the defendant's conduct, the plaintiff was not paid all the wages to which he was entitled. *See, e.g.*, *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 937 (8th Cir. 2013) *cert. denied*, 134 S. Ct. 1515 (2014) (the underpayment for work was "injury in fact"). When Plaintiffs asked the Court to certify a class of all student drivers employed during the last four years, they assumed all drivers were paid less than minimum wage if the per diem is not considered as a wage. However, even under Speakman's flawed calculations, thousands of drivers do not have damages. (Ex. 1, Culhane Decl. ¶¶ 5-6).

Because the class definition failed to exclude drivers who did not suffer damages under Plaintiffs' theory of the case, the class definition is unworkable and the class should be decertified. *See Halvorson*, 718 F.3d at 779 (reversing an order certifying a class of all insurance policy holders in a case alleging the insurer unreasonably denied reimbursement claims, because "some of the class members likely have standing, and some likely do not" and the only way to determine who actually suffered an injury due to the defendant's alleged misconduct was to conduct an individualized merits inquiry); *In re Montano*, 493 B.R. at 857 (concluding a class should be decertified because "even under Plaintiffs' theory of class membership, hundreds of Class 2 members do not have claims against Defendant" and "continued certification of Class 2 with so many members who have no claim" was improper).

IV. CONCLUSION

For the reasons stated herein, Werner requests an Order decertifying the class.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court for the United States District Court for the District Court of Nebraska using the CM/ECF system on this 24th day of June, 2016, which system sent notification of such filing to counsel of record.

/s/ Joseph E. Jones

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